

July 22, 2005

Mike Gallagher, PBT Coordinator  
Washington Department of Ecology  
PO Box 47600  
Olympia, WA 98504

RE: Proposed Rules: Chapter 173-333 WAC – Persistent Bioaccumulative Toxins

Dear Mike:

Northwest Pulp and Paper Association (NWPPA) offers the following comments for the rulemaking record regarding Ecology's proposal to adopt rules for Persistent Bioaccumulative Toxins, Chapter 173-333 WAC.

NWPPA appreciates the effort undertaken by the Department of Ecology to engage in a facilitated stakeholder process to develop the rule and to ascertain areas of agreement among the diverse stakeholders. The process was efficiently and well-managed and the facilitator was effective and well-prepared.

The pulp and paper industry was represented in the stakeholder process by two associations: NCASI for technical issues; and NWPPA for regulatory and procedural issues. As such, the comments of the two organizations should be viewed as complementary. NWPPA incorporates by reference the attached NCASI comments prepared by Dr. Jeff Louch.

In addition, NWPPA makes the following comments for the record.

“Administrative” Rule versus “Significant Legislative” Rule

During the stakeholder process, Ecology took the position that the proposed rule is “administrative,” meaning that the rule applies to Ecology operations and does not pose new regulatory burdens as would a “significant legislative” rule. The thinking was that the proposed rule sets out the process for identifying chemicals to be included in the PBT list, the criteria for selecting those warranting chemical action plans (CAPs) and the process for determining the scope of the CAPs. The additional steps of selecting PBTs or groups of PBTs and the CAP will be subject to public notice and opportunity for comment pursuant to the Administrative Procedures Act.

Comments:

- Given the extensive concern on this subject, NWPPA requests Ecology to clarify this issue in the response to comments.
- WAC 173-333-120(2) describes the opportunity for public involvement with respect to this rule. NWPPA recommends a cross reference to WAC 173-333-410(3)(c-d) and WAC 173-333-430 (6-7) to clarify these separate public involvement opportunities for the next steps in the process.

Chemical Categories (Categories 1, 2 and 3)

WAC 173-333-310(3) sets out three functional categories that the chemicals on the PBT list will be assigned to. These categories are based in practical assessments that should be a first step in deciding whether a CAP is needed. Category 1 are PBTs actually used, released or present in Washington. Category 2 are those for which there is insufficient information on use, release or presence. Category 3 are those for which there are no actual releases or are addressed by other laws.

Comments:

- NWPPA supports the categorization scheme, but believes some issues should be clarified in the response to comments.
- Ecology will still need to assess relative risk and determine toxicity (see NCASI comments 1-3) at some point in the process. This could be done as a preliminary step to preparation of a CAP.
- Clarification of the language describing the three categories would be helpful. For example, as written, Category 1 could include chemicals present and used, but not released to the environment and/or subject to other comprehensive regulation. In actuality, these would belong in Category 3. NWPPA suggests simple language revision or clarification in the record.
- WAC 173-33-410(3)(a)(i) appears to be a reference to the categories in WAC 173-333-310(3) as it repeats some of the concepts, but not in the same terms. As a matter of statutory interpretation, the fact that different wording is used could be construed to mean something different than -310(3).
  - Ecology should clarify that the two sections are referring to the same thing (categories 1,2 and 3); or clarify that it is something different.
  - If Ecology means something different (for example, a first cut at ranking), it should be clarified that this is not a substitute for the assessment of relative risk, a more technical undertaking.

Individual versus Groups

NWPPA supports NCASI comment 4 regarding the need for Ecology to apply the PBT criteria on a chemical or congener specific basis where it has not yet done so, for example, for the various PCBs listed.

### Some Concluding Remarks on Practical Considerations on Whether CAPs Will be Effective

Fundamental to this rule is the decision whether a CAP is needed. Preparation of a CAP is a resource-intensive activity and every possible consideration should be explored before determining that a CAP is needed and will be effective. There was much debate in the stakeholder group regarding the concern that CAPs be addressed to actual environmental problems in Washington State and the measures selected are effective in reducing the identified problem.

The proposed rule contains two important sections in this regard. WAC 173-333-310(3) allows Ecology to place chemicals in Category 3 if already prohibited or if there are no feasible measures beyond those already required under other laws and regulations. In a companion section, WAC 173-33-410(3)(a)(ii), Ecology is charged with examining whether there are opportunities for reduction as part of the criteria for selection of chemicals for CAPs.

NWPPA appreciates these steps but upon further reflection on the relationship between the two sections, it appears that an important concept was not captured in the proposed rule. The proposed rule sections, when viewed together, fall short of assessing whether measures could be effective for abating an identified problem.

#### Comment:

- Assessment of “probability of success” should be a specific consideration in the rule.
- A logical place would be to insert an additional section following WAC 173-333-410(3)(a)(ii).

Thank-you for the opportunity to make these comments.

Sincerely,

Llewellyn Matthews  
Executive Director

Attachment: NCASI Comments